

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY NEWMAN,

Defendant and Appellant.

B205677

(Los Angeles County
Super. Ct. No. NA061974)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Arthur H. Jean, Jr., Judge. Affirmed.

Marilee Marshall & Associates, Inc. and Marilee Marshall, under appointment by
the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle,
Supervising Deputy Attorney General, Chung L. Mar and Douglas L. Wilson, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Henry Newman appeals from the sentence imposed by the trial court on remand from this court for resentencing under the authority of *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). As the trial court properly sentenced defendant pursuant to the dictates of *Sandoval*, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 3, 2004, defendant shot and killed his adult son, Alex. Defendant and Alex had argued, and Alex was in his car in front of defendant's home. Alex began to drive away, but reversed his car and returned, in order to further yell at defendant from his car. Defendant had armed himself with a pre-World War II British military rifle, and aimed his rifle at Alex's car, purportedly intending to fire a warning shot to provoke Alex into leaving. Defendant aimed and attempted to fire the rifle, but no bullet was expelled. Defendant then chambered a round, aimed again, and fired. The bullet traveled through the passenger compartment of the car and hit Alex in his lower back, killing him.

Defendant was charged with murder (Pen. Code, § 187, subd. (a)), and firearm enhancements were also alleged. The jury found defendant not guilty of murder, but guilty of voluntary manslaughter. The jury further found true the allegation that defendant had personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). The trial court sentenced defendant to the upper term for voluntary manslaughter based on its finding of victim vulnerability. The court imposed the upper term for the firearm enhancement based on its findings that defendant was on probation and performed unsatisfactorily on probation.

On appeal from defendant's conviction, we affirmed the conviction and found no error in the imposition of sentence. Subsequently, the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), which held that California's determinate sentencing law violates a defendant's federal constitutional right to a jury trial by assigning to the trial judge the authority to make factual findings that subject a defendant to a higher sentence than the presumptively applicable middle term. There were two important developments in the law prior to the issuance of our opinion on remand. First, the Legislature amended the determinate sentencing law to no longer provide that the middle term is the presumptive sentence in the absence of additional findings, and to instead provide that the trial court has discretion to impose any of the three terms. (Pen. Code, § 1170, subd. (b).) Second, the California Supreme Court decided *Sandoval*, in which it set forth the procedure to be followed when a defendant is resentenced due to *Cunningham* error. Specifically, the California Supreme Court directed that on remand for resentencing, the trial court may exercise its discretion to impose any of the three terms available for the offense, consistent with the Legislature's amendment of the determinate sentencing law. (*Sandoval, supra*, 41 Cal.4th at p. 846.)

In this framework, we considered the issues raised by defendant's sentencing. We concluded that the trial court's imposition of the upper term for voluntary manslaughter based on its finding of victim vulnerability was clearly improper under *Cunningham*. We did not determine whether the imposition of the upper term for the

firearm enhancement based on the trial court's finding that defendant had been on probation was also improper under *Cunningham*; instead, we concluded that the record was unclear as to whether defendant had, in fact, been on probation at the time of the offense. We remanded for resentencing under the procedures set forth in *Sandoval*. We specifically indicated that, on remand, the trial court could exercise its discretion to impose any of the three terms available for defendant's offense.

On remand, the trial court again imposed the upper term on the offense and the enhancement. The court reviewed further evidence indicating that defendant was on probation at the time of the instant offense.¹ The court indicated that the offense "was so egregious, so uncalled for, and so without excuse," that the upper term was justified. The court clarified that each reason applied to the imposition of each upper term or "whatever works in this case," as the court felt that the crime was so egregious and the loss so great that a 21-year sentence was appropriate. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's arguments on appeal are simply based on his disagreement with *Sandoval*. Defendant contends that his resentencing under the Legislature's amendment to the determinate sentencing law violates his right to due process and equal protection,

¹ The court also noted that the current offense violated the terms of probation. This appears no different from the fact that defendant was on probation at the time of the offense, as it is difficult to conceive of a crime committed while a defendant was on probation that would not, by definition, violate the terms of the probation.

as well as the prohibition against ex post facto laws. *Sandoval* itself concluded that resentencing under the discretionary scheme does not violate the ex post facto prohibition nor the guarantee of due process (*Sandoval, supra*, 41 Cal.4th at p. 853) and, in any event, we are bound to follow the decisions of the California Supreme Court.

Defendant next argues that the trial court improperly relied on factors not found true by the jury for its imposition of the upper term. Defendant argues that since we found, in our earlier opinion, that the trial court's reliance on victim vulnerability to impose the upper term was a clear violation of *Cunningham*, it must be a similar violation of *Cunningham* for the trial court to rely on its determination that the offense was particularly egregious.² Defendant's argument seems to ignore the intervening changes in the law, by both the Legislature and the Supreme Court's opinion in *Sandoval*. As California law no longer mandates that the middle term is the presumptive term, and instead grants full discretion to the trial court to impose any of the three terms, the imposition of the upper term based on facts not found by the jury is no longer a constitutional violation.³

² To the extent defendant argues that the trial court could not rely on an implicit finding of malice because the jury, in its verdict, rejected malice, the argument is foreclosed by the Supreme Court's opinion in *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*). In *Towne*, the Supreme Court held that, in imposing sentence, the trial court can consider evidence underlying charges of which a defendant has been acquitted by the jury. (*Id.* at p. 71.)

³ Defendant does not argue that different rules apply when considering the sentence imposed on the enhancement as opposed to the offense. Yet when the Legislature amended Penal Code section 1170, subdivision (b), governing the imposition of sentence on offenses, it did not similarly amend Penal Code

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.

section 1170.1, subdivision (d), governing the imposition of sentence on enhancements. (*People v. Lincoln* (2007) 157 Cal.App.4th 196, 204-206.) While the middle term is no longer the presumptive term for offenses, it *remains* the presumptive term for enhancements. (Pen. Code, § 1170.1, subd. (d).) Thus, *Cunningham* has application to the imposition of the upper term for an enhancement. In this case, the trial court relied on the finding that defendant was on probation at the time of the offense. This is a factor related to recidivism that need not be found by the jury; a trial court can impose an upper term based on its own determination that the defendant was on probation at the time of the offense. (*Towne, supra*, 44 Cal.4th at pp. 70-71.) We interpret the trial court's sentencing decision as imposing the upper term on the sentence enhancement based on its finding that defendant was on probation, and the upper term on the offense within its discretion based on the egregiousness of the crime.